[Case Title] In re:J.C. Wyckoff & Associates, Inc., Debtor
[Case Number] 83-00579
[Bankruptcy Judge] Arthur J. Spector
[Adversary Number]XXXXXXXXXX
[Date Published] July 24, 1985

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION - BAY CITY

In re: J.C. WYCKOFF & ASSOCIATES, INC.,
Case No. 83-00579

Debtor. **41 B.R. 791**
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MEMORANDUM OPINION REGARDING DEBTOR'S MOTIONS FOR PRELIMINARY INJUNCTION AND FOR CONTINUED USE OF CASH COLLATERAL

At a session of said Court held in the Federal Building in the City of Bay City, Michigan on the 24th day of July, 1985.

PRESENT: HON. ARTHUR J. SPECTOR
U.S. Bankruptcy Judge

The debtor filed Chapter 11 on October 21, 1983. At that time it had $28,000 cash on hand, $111,000 in inventory and $149,000 in accounts receivable, for a total value of cash collateral as that term is defined in 11 U.S.C. §363(a) of $288,000. At that time, Second National Bank of Saginaw had a first lien on substantially all of the debtor's assets, including the cash collateral, as well as a mortgage on the real property serving as the debtor's base of operations. The balance owing to Second National Bank at the time of the filing was approximately $530,000. The parties have not valued the other collateral possessed by the bank for purposes of this hearing. Thus, we are unable to determine whether the bank was adequately protected for the cash collateral at the inception of the case. At the time of trial, the debtor had $4,000 cash, $112,000 in inventory, and $47,000 in accounts receivable, for a total value of cash collateral of $163,000. The debtor has paid the bank $109,000 in principal plus about $70,000 in interest post-petition; the parties agreed that the bank has marginally improved its position post-petition.

At the beginning of the case, the debtor made a motion for use of the cash collateral in the operation of its business. The parties stipulated to such use, and finally, on April 26, 1984, they reached a definitive agreement for continued use of cash collateral. That agreement provided that the debtor was to pay down pre-existing debt by $150,000, and that the bank would advance to the debtor a line of credit equal to that same $150,000 for use post-petition. This deal was structured as a post-petition obtaining of credit under 11 U.S.C. §364, as opposed to a provision for adequate protection for the use of cash collateral under §363 of the Code. The bank was given a new first lien on all of the assets of the debtor to secure this indebtedness. Most importantly, the agreement contained this language: Even if the debtor defaults by failure to meet its performance projections, the debtor shall have the right to move for continued use of cash collateral nonetheless and "the $150,000 paydown made pursuant to this Agreement may be considered cash collateral."

The debtor's business is extremely seasonal in nature. Its heaviest sales are done in October, November and December of each year. In July, August and September, it is busy acquiring inventory for this sales season. The balance of the year the debtor is dormant or merely collects accounts receivable.

In the fall of 1984, the parties began negotiations for a new line of credit, which talks culminated finally in an agreement dated January 10, 1985. The terms of that agreement differ significantly from the April 26, 1984 agreement. First of all, the debtor requested and obtained an increased line of credit. The previous line was limited to $150,000; the new line was set at $180,000. In return for that concession, the bank exacted some favorable changes in the agreement. First of all, the language in the April 26, 1984 agreement which characterized the $150,000 reduction in the pre-petition debt as "cash collateral" and which thus opened the door to the debtor to move for an order seeking its return, does not appear in the January 10, 1985 agreement. Instead, there is a plain statement that "Bank shall have no obligation to Debtor after February 28, 1985, to advance any further monies or in any way to continue any financing arrangement with the Debtor." Also, the January 10, 1985 agreement embodied a modified "drop dead" clause which terms included a stipulated lift of stay and the right of the bank to immediately seize and set off accounts receivable against the debt, upon three days' notice. Within that notice period, the plaintiff could (and in this case did) move for an injunction to prohibit such collections. Also, the debtor was not precluded from making a motion for continued use of cash collateral, but, as noted above, the term "cash collateral" no longer explicitly included monies that had been previously paid back to the bank. The agreement called for a repayment of the indebtedness by March 31, 1985. When it was obvious that the debtor could not perform this duty, an extension of the due date was negotiated to June 30, 1985. Although the debtor drew down only $150,000 of the available $180,000 of the line of credit, it was unable to pay back $41,000 thereof. That is the balance still due to the bank on the new line of credit.

The debtor seeks to prevent the bank from collecting this $41,000 shortage and moved for an order allowing continued use of the cash collateral not only in its possession, but also of the $109,000 of the $150,000 which it has paid back to the bank. The bank agreed at the beginning of trial that it would not seek to collect the outstanding $41,000 during the pendency of this case, and therefore, the plaintiff's motion for injunctive relief with regard to that is deemed conceded and will be granted. However, the bank strongly argued that the $109,000 which the debtor returned to the bank is not cash collateral, and that it has no intention of loaning it back to the debtor for use during the case or otherwise. The debtor takes the position that unless it can get the $109,000 returned to it, the $41,000 remaining balance and the remaining cash collateral it possesses is insufficient to finance new inventory purchases. As a result, it would likely have to close its doors unless its motion for return of the $109,000 is granted. The bank argues that the plain wording of the agreement shows that the $109,000 was not cash collateral and that the January 10, 1985 transaction was nothing more than a court authorized post-petition loan. It argues that the Court has no power to force it to make a new loan to a Chapter 11 debtor. The debtor insists that even if the express language of the January 10, 1985 agreement does not support its position, the agreement is ambiguous and the parties' intentions should be considered in interpreting its terms.

The Court examined the January 10, 1985 agreement, together with the motion for approval of the agreement, the proof of service thereof, the certification of no objections and the order approving the agreement, having deemed them all to be parts of the same transaction. The agreement was determined to be ambiguous for the reasons stated on the record. Therefore, parol evidence was introduced to determine the intentions of the party.

It is apparent from the testimony of its witnesses that the debtor's intentions were to continue the material language of the April 26, 1984 agreement with respect to opportunity to utilize funds previously repaid to the bank. However, the bank had quite a different view of the matter. Its intentions from the beginning of the case was to divorce itself from any relationship with the debtor. Even at the inception of the case, it wanted not to finance the debtor, but it felt that the bankruptcy court would order use of collateral anyway. Therefore, it made a tactical decision to enter into an agreement with the debtor which would at least condition the use of cash collateral upon the meeting of certain sales and cash-flow projections. Its goal throughout, however, was to eventually get out of the obligation to continue financing the debtor. All of its tactical moves in this case were directed toward that end. Although it agrees that the April 26, 1984 agreement allows the debtor to re-obtain the paid-in funds, it claims that the substantial change in terminology in the January 10, 1985 agreement which deleted such reference and instead substituted an express statement that the bank no longer would have an obligation to loan funds after February 28, 1985 was intentional, strategic, and should be rendered effective. Although the bank knew that after the line of credit was repaid in March, 1985, the debtor would have a continuing need for financing it 1985-1986 selling season, it expected that the debtor would either finance it internally or obtain a lending source other than Second National Bank of Saginaw.

Although the agreement is ambiguous, and each party's interpretation thereof can be supported, it is my opinion that the bank's interpretation of the documents is more consistent with the terms of the documents themselves, and should therefore be sustained. The bank intentionally maneuvered itself into a position where it could eventually "pull the plug" on the debtor, and did so without defrauding or misleading the debtor. The debtor on the other hand, participated fully in negotiating and drafting the instruments, and entered into the agreement with its eyes open to the actions now being taken by the bank. The debtor either could have, or should have, anticipated that the bank intended to terminate the relationship between the parties. Essentially the instant agreement represents a fully and fairly bargained-for arrangement in which the debtor received a new line of credit for up to $180,000, while the bank obtained the ability to refuse to lend the debtor any more money. The debtor's failure to realize the potential consequences of the transaction do not constitute sufficient cause to alter the bargained-for rights of the parties.

What happened was that early on in the case the debtor allowed the creditor to change the question from one of use of cash collateral to one of a post-petition credit transaction. The debtor thus consented to "play in the bank's ballpark." The debtor probably made a strategic mistake in so doing, for when the inquiry is one of continued use of cash collateral, all the debtor has to show is that the creditor's interest is adequately protected, while when the question is the obtaining of credit, no one can force a lending institution to make a loan it does not wish to otherwise make. This wise bit of strategy by the bank's attorneys has now borne fruit. There is no legal or equitable reason to deny it this victory, especially where the debtor was represented throughout by experienced counsel.

Accordingly, I find that the state of affairs with regard to the debtor's ability to use cash collateral is as the bank asserts it to be. In other words, any payments made pursuant to the January 10, 1985 agreement were applied to reduce the amount of the outstanding line of credit and no longer have the character of "cash collateral". Those funds are now in the possession and ownership of Second National Bank of Saginaw and are in no way burdened by the debtor's claim that they are cash collateral of its bankruptcy case. Thus the balance of the cash collateral attributable to the $150,000 post-petition borrowing is $41,000, the amount that is still within the debtor's possession. Although the bank apparently does not at this time dispute the debtor's right to use those funds or the other cash, inventory, and accounts receivable the debtor possesses, the debtor has not made any proposal for adequately protecting the bank's interest therein. Therefore, at this time, no justification exists to allow the continued use of the cash collateral. When and if the debtor makes a proposal for adequately protecting the bank's interest in the cash collateral, a new hearing will be set thereon.

The foregoing sets forth my findings of fact and conclusions of law. An order consistent with this opinion has been entered.

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ARTHUR J. SPECTOR
U.S. Bankruptcy Judge